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ILLINOIS MEDICAL MALPRACTICE: REDEFINING THE SOLE PROXIMATE CAUSE DEFENSE

Kristina M. Lau[*]

I. INTRODUCTION

Illinois tort law has long provided a mechanism for defendants to contest and fully refute allegations of negligence. If successfully argued, the sole proximate cause defense has the effect of absolving the defendant of all liability. The exact parameters of who, when, and how the defense is employed is constantly evolving. In recent years, the doctrine of sole proximate cause has received generous attention from the Illinois appellate courts and the Illinois Supreme Court. Such recent case law suggests the defense is alive and well; however, it also raises pertinent concerns regarding its changing scope and availability. Moreover, these concerns have a profound effect on medical malpractice actions, which confront distinct challenges from general negligence cases.

Sole proximate cause, commonly known as the "empty chair defense," is a widely recognized concept. However, there is still ample confusion between bench and bar regarding the proper scope of its applicability. The following note examines the doctrine of sole proximate cause within the context of medical malpractice litigation in Illinois. Specifically, the note traces how sole proximate cause has evolved through relevant case law and subsequently analyzes who, when, and how defendants may present and argue the defense and receive the accompanying jury instructions. This author contends that the scope of sole proximate cause has grown even more favorable to defendants, so as to present a unique challenge for plaintiffs alleging medical malpractice and/or negligence. In such actions, the plaintiff must establish the proper standard of care to assess the defendant's conduct, determine whether there was a negligent breach of the standard of care, and show that the resulting injury was proximately caused by the defendant's lack of skill or

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due care.[1] For purposes of this note, the discussion will exclusively focus on how sole proximate cause relates to proximate causation. First, this note introduces the plaintiff's burden of proving proximate cause; second, the defendant's right to raise the sole proximate cause defense; and third, the recent case law and the associated implications on the viability and applicability of the sole proximate cause defense.

II. BACKGROUND: PLAINTIFF'S BURDEN OF PROVING PROXIMATE CAUSE

Prior to examining the sole proximate cause defense, it is important to understand the plaintiff's burden to show proximate causation. While proximate cause may be simple to establish in a two-party accident, medical malpractice cases often present a more unique challenge. In such cases, establishing that the defendant's negligence was the proximate cause of the plaintiff's injury becomes muddled and confounded by the preexisting condition of the plaintiff. Specifically, in a medical malpractice action, the plaintiff bears the burden of proving that the defendant's breach of the applicable standard of care proximately caused the injuries at issue.[2]

Plaintiff attorneys may also consider weaving a loss of chance or worsened outcome theory into their proximate cause analysis. In this context, plaintiffs may pursue one of four theories. Here, the ultimate question asks "whether medical providers have negligently deprived the plaintiff of a chance to survive or recover from a health problem or, though their malpractice, have lessened the effectiveness of treatment or increased the risk of an unfavorable outcome to the plaintiff."[3] While Illinois courts have teetered between requiring and not requiring plaintiffs to prove a better result, the court affirmed this requirement in *Johnson v. Loyola University Medical Center* in 2008.[4]

Proximate causation must be established through expert testimony to a reasonable degree of medical certainty and cannot be "contingent, speculative, or merely possible."[5] Moreover, although the plaintiff is not required to present unequivocal evidence of causation, he or she can meet one's burden of proof by introducing circumstantial evidence from which

1. Higgens v. House, 680 N.E.2d 1089, 1092 (Ill. App. Ct. 1997).
2. Reardon v. Bonutti Orthopaedic Servs., Ltd., 737 N.E.2d 309, 317-18 (Ill. App. Ct. 2000).
3. Terrence J. Lavin & Kristina M. Lau, *Proving Proximate Cause in Malpractice Cases*, 97 ILL. B.J. 254, 254 (2009) (citing Holton v. Mem'l Hosp., 679 N.E.2d 1202, 1207 (Ill. 1997)).
4. Johnson v. Loyola Univ. Med. Ctr., 893 N.E.2d 267, 272-73 (Ill. App. Ct. 2008).
5. *Id.* at 272.

a jury can make all reasonable inferences.[6]

There are two parts to proving causation; namely, cause in fact and legal causation.[7] Cause in fact requires the plaintiff to show that a defendant's negligence was more probably than not an actual cause of his or her injury.[8] Courts commonly subscribe to one of two tests to determine the existence of cause in fact: the traditional "but for" test, which maintains, "a defendant's conduct is not a cause of an event if the event would have occurred without it."; and, alternatively, the "substantial factor" test, which maintains, "the defendant's conduct is said to be a cause of an event if it was a material element and a substantial factor in bringing the event about."[9] Legal causation moves the analysis one step further. It specifically requires that the injury be "a natural and probable result of the negligent act or omissions, and be of such a character as an ordinary prudent person ought to have foreseen as likely to occur as a result of negligence. Although, it is not essential that the person charged with negligence should have foreseen the precise injury which resulted from his act."[10]

Finally, it is significant to note that an injury may have more than one proximate cause. "If the defendant was negligent, his negligence does not need to be the sole cause of plaintiff's injury; it is enough if the defendant's negligence is one of many causes."[11] Thus, an actor is liable for his negligent conduct whether he contributed in whole or in part to the injury.[12] Accordingly, it is not a defense that someone or something else also contributed to the injury.[13]

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6. Cummings v. Jha, 915 N.E.2d 908, 922 (Ill. App. Ct. 2009) (citing Bergman v. Kelsey, 873 N.E.2d 486, 500 (Ill. App. Ct. 2007)).

7. Lee v. Chi. Transit Auth., 605 N.E.2d 493, 502 (Ill. 1992), *cert. denied*, 508 U.S. 908 (1993).

8. Johnson, 893 N.E.2d at 272.

9. Nolan v. Weil-McLain, 910 N.E.2d 549, 557 (Ill. 2009) (quoting Thacker v. UNR Indus., Inc., 603 N.E.2d 449, 455 (Ill. 1992)).

10. Williams v. Univ. of Chi. Hosp., 179 Ill. 2d 80, 87 (1997), *see also* Holton v. Mem'l Hosp., 176 Ill. 2d 95, 107 (1997).

11. John G. Phillips, *The Sole Proximate Cause "Defense": A Misfit in the World of Contribution and Comparative Negligence*, 22 S. ILL. U. L. J. 1, 1 (1997).

12. Thompson v. Gordon, 398 Ill. App. 3d 538, 550 (2009).

13. *Id.*

III. BACKGROUND: DEFENDANT'S RIGHT TO RAISE THE SOLE PROXIMATE CAUSE DEFENSE

A. General

The purpose of the sole proximate cause defense is to provide the defendant with a mechanism to defeat a plaintiff's claim of negligence by establishing proximate causation in the act of another person or entity.[14] While it is not a defense that another party's negligence *also* caused the harm, it is a defense when conduct independent of the defendant *entirely* caused the harm.[15] The sole proximate cause defense may be raised "where there is some competent evidence that the sole proximate cause of a plaintiff's claimed injury lies in the conduct of someone other than the defendant."[16] The defendant may point to another party or an "empty chair" without offering expert testimony that criticizes the care of the uninvolved party.[17] Moreover, the defendant may argue in closing that another party caused the injury, notwithstanding the absence of evidence tending to establish that the party's conduct was negligent. To this extent, the defendant is entitled the sole proximate cause jury instruction provided there is "some competent evidence" that something external to the defendant's conduct was the sole cause of injury.[18]

B. Procedure and Pleading

The First District in *Robinson v. Boffa* appropriately explained:

> The defendant is not required to plead lack of proximate cause as an affirmative defense. However, 'if there is evidence that negates causation, defendant should show it.' A defendant has the right to rebut evidence tending to show that his acts are negligent and a proximate cause of the plaintiff's injuries and he has the related right to establish that some other causative factor was the sole proximate cause of the injuries . . . .[19]

From a procedural standpoint, answering the plaintiff's complaint with a general denial of liability is sufficient to present evidence that the

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14. McDonnell v. McPartlin, 192 Ill. 2d 505, 516 (2000).
15. Ellig v. Delnor Cmty. Hosp., 237 Ill. App. 3d 396, 405 (2nd Dist. 1992).
16. IPI CIVIL 3D No. 12.04; *see also* Nassar v. County of Cook, 333 Ill. App. 2d 289, 297 (1st Dist. 2002).
17. McDonnell, 192 Ill. 2d at 519-523.
18. McDonnell, 192 Ill. 2d at 520.
19. Robinson v. Boffa, 930 N.E.2d 1087, 1094 (Ill. App. Ct. 1 Dist. 2010) (internal citation omitted).

injury was the result of another person or cause.[20] Accordingly, the defendant has no additional requirement to plead sole proximate cause as an affirmative defense.[21] Recall, "[w]here there is some competent evidence that the sole proximate cause of a plaintiff's claimed injury lies in the conduct of someone other than the defendant, the defendant is entitled to have the jury instructed [on sole proximate cause], notwithstanding the absence of evidence tending to establish that the third person's conduct was negligent."[22]

A sole proximate cause instruction, like any jury instruction, requires that there be some evidence to support its theory and use. There are two forms of jury pattern instructions used in these cases. First, a pattern instruction on sole proximate cause applies where there is evidence that *someone* other than the defendant is the sole proximate cause of the plaintiff's injury. Illinois Pattern Instruction (IPI) 12.04 titled "concurrent negligence other than defendant's" instructs the jury:

> More than one person may be to blame for causing an injury. If you decide that a [the] defendant[s] was [were] negligent and that his [their] negligence was a proximate cause of injury to the Plaintiff, it is not a defense that some third person who is not a party to the suit may also have been to blame.
>
> However, if you decide that the sole proximate cause of injury to the Plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant.[23]

Alternatively, a pattern instruction on negligence, through the intervention of an outside agency, applies where there is evidence that *something* other than the defendant's conduct is the sole proximate cause of the plaintiff's injury. IPI 12.05, titled "negligence- intervention of outside agency," instructs the jury:

> If you decide that a [the] defendant[s] was [were] negligent and that his [their] negligence was a proximate cause of injury to the Plaintiff, it is not a defense that something else may also have been a cause of the injury.

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20. McDonnell, 736 N.E.2d at 1084.
21. *Id.*
22. *Id.* at 1085.
23. IPI CIVIL 3D No. 12.04.

> However, if you decide that the sole proximate cause of injury to the Plaintiff was something other than the conduct of the defendant, then your verdict should be for the defendant. [24]

As expressed in the second paragraphs of IPI 12.04 and 12.05, the jury may consider the sole proximate cause defense only if tendered the long form instruction. In comparison to the standard of proof required for a long form IPI 12.04 instruction, a long form IPI 12.05 instruction requires less from the defendant. As illustrated in *Robinson*, the First Appellate District approved a sole proximate cause jury instruction, provided the defendant point to *any* other medical condition that may have been the cause of plaintiff's injuries.[25]

C. Evolution of Sole Proximate Cause in Illinois

Sole proximate cause is not a new concept or theory. As explained by former President of the Illinois Trial Lawyers John Phillips, "Historically, the idea of 'sole proximate cause' or 'sole cause,' appeared in Illinois cases as early as 1901."[26] Despite its longstanding origins, however, the history of sole proximate cause has not been comprehensively examined.[27] Mr. Phillips further explains that Illinois courts have often intertwined and confused the concepts of sole cause and superseding cause.[28] While the origins and evolution of sole proximate cause are not clear, the courts have addressed the scope and applicability of the defense time and time again. The following section traces the evolution of sole proximate cause through the courts.

In *Leonardi v. Loyola University of Chicago*, the Illinois Supreme Court examined the appropriate circumstances where defendants were entitled to present evidence that a nonparty physician was solely liable for harm to the patient. In *Leonardi*, the estate of a deceased patient brought a medical malpractice suit against the decedent's hospital and physicians following an emergency pulmonary embolectomy that resulted in irreversible brain damage to the patient.[29] In ruling on the admissibility of evidence relating to the defendant's sole proximate cause argument, the supreme court noted that "[t]he sole proximate cause defense merely

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24. IPI CIVIL 3D No. 12.05.

25. Robinson, 930 N.E.2d at 1094.

26. Phillips, *supra* note 11, at 4.

27. *Id.* at 5 (explaining that resources such as the Restatement of Torts, law reviews, books, treatises, and periodicals have failed to shed light on the origins, limitations and framework of "sole proximate cause").

28. *Id.*

29. Leonardi, 658 N.E. 2d at 454.

focuses the attention of a properly instructed jury . . . on the plaintiff's duty to prove that the defendant's conduct was a proximate cause of plaintiff's injury."[30] In its opinion, the court stressed the defendant's right to present a defense and rebut allegations of wrongdoing. "A defendant has the right not only to rebut evidence tending to show that defendant's acts are negligent and the proximate cause of claimed injuries, but also has the right to endeavor to establish by competent evidence that the conduct of a third person, or some other causative factor, is the sole proximate cause of plaintiff's injuries." [31]

In *Holton v. Memorial Hospital*, the sole proximate cause instruction was rejected because there was insufficient evidence to demonstrate that it was *only* the negligence of persons other than the hospital employees that proximately caused the plaintiffs' injuries.[32] In *Holton*, the plaintiffs sought damages arising from Patricia Holton's personal injuries, allegedly caused by the defendants' negligence.[33] Following trial, the jury returned a verdict in favor of the plaintiffs, and the appellate court affirmed.[34] The defendants appealed, arguing the court erred by excluding the long form jury instruction 12.04, which would have instructed the jury on a sole proximate cause provision based on the conduct of third parties.[35] The Supreme Court of Illinois rejected the defendants' contention on the basis that they failed to present evidence that it was *only* the negligence of persons other than the hospital employees that proximately caused plaintiff's injury.[36] Additionally, the defendants erred in attempting to establish that *no* medical negligence occurred at all.[37] The Supreme Court of Illinois revisited the language posed in *Leonardi*, which stressed that a sole proximate cause instruction was proper if there was competent evidence that another person or condition was the sole proximate cause of plaintiff's injury.[38] The court further reasoned, "[a] defendant is not automatically entitled to a sole proximate cause instruction wherever there is evidence that there may have been more than one, or concurrent, causes of an injury or where more than one person may have been negligent. Instead, a sole proximate cause instruction is not appropriate unless there

30. *Id.* at 456.
31. *Id.* at 459.
32. Holton v. Mem'l Hosp., 176 Ill. 2d 95, 134 (1997).
33. *Id.* at 99.
34. *Id.* at 103.
35. *Id.* at 133.
36. *Id.* at 134.
37. *Id.*
38. *Id.*

is evidence that the *sole* proximate cause (not "a" proximate cause) of a plaintiff's injury is conduct of another person or condition."[39] The outcome of *Holton* was premised on the complete absence of evidence that someone or something other than the defendant was the *sole* proximate cause of the plaintiff's injuries. Thus, pursuant to *Holton,* it is insufficient to present evidence that shows someone or something other than the defendant was a contributing cause to the plaintiffs' injuries. *Holton* unequivocally required the defendant to present evidence tending to show sole or only causation, to be afforded the defense and accompanying jury instruction.

McDonnell v. McPartlin took the sole proximate cause inquiry one step further by distinguishing between the long form jury instructions, IPI 12.04 and 12.05. Specifically, the *McDonnell* court addressed whether a defendant in a medical negligence case, who points to the conduct of a nonparty physician as the sole proximate cause of plaintiff's injury, must demonstrate that the nonparty physician's conduct was professionally negligent, as well as the sole proximate cause of plaintiff's injury.[40] In *McDonnell*, the plaintiff, executrix of her husband's estate, filed a wrongful death and survival action against his doctors and their corporate employers.[41] Plaintiff alleged the defendants were medically negligent in failing to diagnose and treat her husband's hip infection that ultimately resulted in his death.[42] Defendants denied any liability, arguing a nonparty was the sole proximate cause of his death.[43] The trial court entered judgment following a jury verdict in favor of defendants, and the appellate court affirmed.[44] On appeal, plaintiff contended the court erred by instructing the jury on the sole proximate cause instruction.[45] The supreme court disagreed with the plaintiff's contention and held that "in the context of a medical negligence case, the sole proximate cause instruction requires only that the defendant present some evidence that the nondefendant was the sole proximate cause of the plaintiff's injury. It is not necessary that the defendant also establish that the nondefendant's conduct was medically negligent."[46] Deferring to the plain language of IPI No. 12.04, the court stressed that the instruction refers only to the "*conduct* of some person

39. *Id.*
40. McDonnell, 736 N.E.2d at 1079.
41. *Id.* at 1080.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. McDonnell, 192 Ill. 2d at 516.

other than the defendant, not the *negligent conduct* of some person other than the defendant."[47] Furthermore, the "Notes on Use" accompanying the instruction similarly explained that "[t]he second paragraph should be used only where there is evidence tending to show that the sole proximate cause of the occurrence was the *conduct* of a third person, not the *negligent conduct* of a third person."[48] The court determined there was no explicit requirement that the jury should consider whether the nonparty's conduct was negligent.

Although outside of the medical malpractice context, *Nolan v. Weil-McLain* is instructive because it gives rise to the "dual sole proximate cause defense."[49] In *Nolan*, plaintiff, as executrix of the decedent's estate, sought recovery for the wrongful death of her husband.[50] Plaintiff alleged that the decedent developed mesothelioma, an asbestos-related cancer, after being negligently exposed to defendant's asbestos-containing products.[51] All of the defendants except for Weil-McLain settled or were dismissed prior to trial.[52] The trial court granted plaintiff's motion *in limine* barring the defendant from introducing evidence of the decedent's other asbestos-related exposures by nonparty entities.[53] Following trial, the jury returned a verdict in favor of the plaintiff, and the appellate court affirmed.[54] On appeal, the supreme court reversed, finding that Weil-McLain should have been permitted to present evidence to establish that the conduct of another entity was the sole proximate cause of the decedent's injury.[55] By excluding such evidence, the trial court improperly prevented the defendant from presenting a sole proximate cause defense, thus making the case "undefendable" for defendant.[56] "Our case law, properly interpreted, stands for the proposition that the jury must be allowed to sort through competent-and likely conflicting-evidence so that it can fairly resolve whether exposure to a particular product was the proximate cause of injury."[57]

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47. *Id.* at 517 (emphasis added).

48. *Id.* at 518.

49. Lindsay Brown, *Dual Sole Proximate Causes: Asserting an Effective Oxymoronic Defense*, 20 IDC QUARTERLY, MONTH 2010, at 1, 22 (The author defined dual sole proximate cause as, "[A] defense strategy wherein a defendant alleges that two entirely separate individuals, entities, or things are each solely to blame for the plaintiff's injury.).

50. Nolan, 233 Ill. 2d at 418.

51. *Id.* at 419.

52. *Id.*

53. *Id.* at 419.

54. *Id.* at 418.

55. *Id.* at 445.

56. *Id.*

57. Nolan, 233 Ill. 2d at 445.

More recently, the Illinois Supreme Court addressed how to apply the sole proximate cause defense in regards to a settled defendant. While also outside of the medical malpractice context, *Ready v. United/Goedecke Services* is instructive because the court was compelled to address two relevant inquiries associated with raising the sole proximate cause defense. First, *Ready* addressed how courts should construe the statutory language of joint tortfeasor liability. Second, *Ready* considered whether it was proper to exclude evidence offered to show that the sole proximate cause of plaintiff's injuries stemmed from the conduct of settling defendants. In *Ready*, the decedent was killed in an accident at the power plant, where he worked, after a scaffolding truss fell and struck him in the shoulder.[58] Plaintiff, the executrix of decedent's estate, filed a wrongful death claim against the general contractor, the subcontractor, and the decedent's employer.[59] The plaintiff settled her claims against the employer and the general contractor, and proceeded to trial against the subcontractor (United).[60]

The trial court ruled in a pretrial motion that United would not be allowed to present any evidence regarding the conduct of the settling defendants.[61] Additionally, the trial court denied United's requested sole proximate cause jury instruction form, effectively excluding the contractor and employer from the verdict form.[62] The jury returned a verdict in the plaintiff's favor, and the trial court entered judgment accordingly.[63] United appealed, arguing the trial court had erred in excluding evidence regarding the conduct of the general contractor and employer as the sole proximate of the accident, and in refusing its sole proximate cause jury instruction.[64] The appellate court affirmed in part and reversed in part, and remanded for a reapportioning of fault, finding that the general contractor and employer should have been on the verdict form.[65] The supreme court subsequently reversed the appellate court's holding because Section 2-1117, unequivocally, does not permit apportioning of fault to settling defendants.[66] Moreover, because the appellate court never addressed the sole proximate cause issue, the Illinois Supreme Court remanded the case

58. Ready v. United/ Goedecke Services, Inc., 238 Ill. 2d 582, 584 (2010).
59. *Id.* at 584-85.
60. *Id.* at 585.
61. *Id.* at 585-86.
62. *Id.* at 587.
63. *Id.*
64. Ready, 238 Ill. 2d at 587.
65. *Id.*
66. *Id.*

again to address "United's concern that it was deprived of a sole proximate cause defense when the trial court refused its request for an instruction on sole proximate cause."[67] On remand, the First Appellate District determined the trial court abused its discretion in excluding evidence of the settling defendants' conduct.[68] Before the case could be returned to the trial court, the Supreme Court granted plaintiff's petition for leave to appeal.

Revisiting the court's decision in *Nolan* and the language in *Leonardi*, the Supreme Court agreed that the trial court erred in excluding evidence that would have supported the defendant's sole proximate cause defense.[69] Having decided that the trial court erred, the Supreme Court was tasked to determine whether the error was "harmless."[70] The court concluded it was, and "that even a properly instructed jury would not have reached a different verdict because there was significant evidence that United was a proximate cause of the accident."[71]

IV. ANALYSIS

A. Effect of Ready

The outcome of *Ready* is significant because it has profound implications for determining comparative negligence of multiple defendants and how evidence of settling defendants may be used in advancing the sole proximate cause defense. It was important for the court to address which parties constituted a "defendant sued by the plaintiff" under Section 2-1117 of the Illinois Joint Liability Act because it redefined *who* defendants could point to in advancing the sole proximate cause defense. Prior to the court's holding in *Ready,* a "defendant sued by the plaintiff" could have been interpreted to include all original parties or the remaining parties following pre-trial settlements. Following *Ready*, a settling defendant would not be considered a "defendant sued by the plaintiff." As a nonparty, evidence offered to show sole proximate cause in the conduct of a settling defendant could still be presented at trial.

The *Ready* court also determined that where there was significant evidence to show the defendant was a proximate cause of the injury,

67. *Id.*
68. *Id.* at 588.
69. *Id.* at 590.
70. *Id.* at 592.
71. *Id.*

evidence of another party's negligent conduct was not admissible because no reasonable jury could conclude that another party's negligent conduct was the sole proximate cause of injury.[72] Here, the court appropriately suggests that if the manifest weight of the evidence infers that the defendant is liable for the plaintiff's injuries, it would be improper to cast blame on a third party or entity.

Ready further suggests that the sole proximate cause defense is alive and well in Illinois. Notwithstanding whether the "empty chair" was a settling defendant or a nonparty, *Ready* confirms that there is at least one avenue for defendants to introduce evidence of such negligence.[73] However, having resolved the aforementioned issues, the *Ready* decision leaves audiences wanting for further clarification. By definition, a defendant that raises a sole proximate cause defense points to a separate person, an entity, or a factor that proximately caused the plaintiff's alleged injury. Although the *Ready* court did not expressly indicate that a defendant may point to more than one sole proximate cause, its holding suggests that defendants may do so. Specifically, the court held the defendant should have been permitted to present evidence of the general contractor's conduct *and* the employer's conduct. This is significant for two reasons: first, it intuitively contradicts what *sole* proximate cause intends to accomplish. Second, it has the effect of expanding the scope and availability of the sole proximate cause defense.

B. Is Ready Inconsistent with the Sole Proximate Cause Doctrine?

Recall, in Illinois, a sole proximate cause instruction is only proper when there is evidence that the *sole* proximate cause of a plaintiff's injury is conduct of another person or condition. Accordingly, evidence cannot point to *a* proximate cause, but the *sole* proximate cause of injury. Borrowing from the court's reasoning in *Holton*, it would be improper to permit evidence of more than one entity's conduct in raising a sole proximate cause defense. *Leonardi* and *Holton* stress that defendants wishing to advance the defense should point to only one alternative cause. Specifically in the medical malpractice context, the First Appellate District has found that the sole proximate cause instruction was improper where the defendant presented evidence of "multifactorial" causes of death.[74] Contrary to these rules guiding the applicability of sole proximate cause,

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72. *Id.* at 582.

73. David Sethi, *The "Empty Chair"/ Sole Proximate Cause Defense is Alive and Well in Illinois*, March 17, 2011, available at http://wmlaw.com/_file/articles/THE%20EMPTY%20CHAIR.pdf.

74. Clayton v. Cook, 346 Ill. App. 3d 367 (1st Dist. 2004).

the court in *Ready* suggests the defense is not necessarily limited to one entity or nonparty. Alternatively, the court seemingly approves the defendant's strategy that two separate entities were each solely to blame for decedent's untimely death.

From a purely mechanical perspective, the word "sole" indicates a singular entity. Synonyms of the word "sole" include adjectives such as: "one," "only," and "single."[75] In effect, "the addition of the word 'sole' only emphasizes the single nature of the direct cause of an event."[76] It is arguably misleading to employ the sole proximate cause defense when the defendant may point to more than one probable cause of injury.

C. How are these Incongruities Reconciled?

In the last few years, Illinois courts have shown a greater willingness to permit evidence offered to show that the "sole" proximate cause of injury was the result of more than one cause. As illustrated in *Nolan*, the Illinois Supreme Court affirmatively held that the defendant should have been permitted to present evidence that the "sole" proximate cause of the decedent's death was his exposure to the asbestos-containing products of eleven separate nonparty entities. Revisiting the language in *Holton* and *Leonardi*, the *Nolan* court did not focus on the number of other "sole" possible causes, but rather on the availability of pointing to some other cause(s).

Most recently, the Illinois appellate court returned to the medical malpractice context and addressed this precise question- whether a defendant may point to more than one "sole" proximate cause? In *Robinson v. Boffa,* the court expressly approved of this strategy. In *Robinson*, Ms. Boone underwent surgery to remove a cancerous tumor from her colon.[77] After failing to remove the tumor in the first surgery, the surgeon performed a second surgery five days later.[78] Ms. Boone passed away shortly thereafter.[79] Decedent's estate sued the surgeon for medical malpractice, claiming that he violated the applicable standard of care by failing to remove the cancerous tumor during the first surgery.[80] At trial, the defendant presented evidence to support two distinct sole proximate

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75. Merriam-Webster Online Thesaurus. "sole," Mar, 20, 2011, available at http://www.merriam-webster.com/thesaurus/sole.

76. Phillips, *supra* note 11 at 6 (citing Crouch v. Nicholson, 156 S.E. 2d 384, 386 (Ga. App. Ct. 1967).

77. Robinson v. Boffa, 930 N.E.2d 1087, 1089 (Ill. App. Ct. 2010).

78. *Id.*

79. *Id.*

80. *Id.*

cause theories. First, that the proximate cause of the decedent's death was multisystem failure, secondary to her general poor health; and second, the gastroenterologist's negligence in failing to locate the cancerous tumor in his colonoscopy report.[81] The jury found in favor of the defendant and the court entered judgment accordingly. Subsequently, the plaintiff appealed on two grounds. First, she contended there was insufficient evidence to support the sole proximate cause theories raised at trial, and second, that the court committed a reversible error by tendering the long form sole proximate cause instructions to the jury.[82]

On appeal, the court addressed each of defendant's sole proximate cause defenses. First, the court found that tendering the long form of IPI 12.05 was proper.[83] The *Robinson* court reasoned there was sufficient evidence presented at trial to support the defendant's argument that decedent's demise was caused by her preexisting medical condition.[84] In support, the court cited *McDonnell* for the proposition that a defendant is entitled to the long form sole proximate cause jury instruction so long as there is "some competent evidence" to support that defense.[85] Having reached this conclusion, the court found the trial court erred in tendering the long form IPI 12.04 because there was no evidentiary basis to support the defendant's second sole proximate cause defense.[86] Specifically, the court rejected the defendant's assertion that the decedent's death resulted from the nonparty gastroenterologist's failure to properly locate the tumor. While the court recognized this error, the plaintiff failed to show she was prejudiced by the instructional error.[87] Accordingly, the trial court's holding was affirmed.[88]

Robinson effectively expands the scope and understanding of the sole proximate cause defense. The ruling stands for the proposition that a defendant may point to more than one "sole" proximate cause in raising the defense. For defendants, the required evidentiary threshold is rather low. Pursuant to *McDonnell*, the defendant only has to present "some evidence" that the nonparty was the sole proximate cause of the plaintiff's injury to be entitled to the long form jury instruction. Furthermore, that defendant is not required to establish that the nonparty's conduct was

81. *Id.* at 1090.
82. *Id.*
83. *Id.* at 1094.
84. *Id.*
85. *Id.* (citing McDonnell v. McPartlin, 192 Ill. 2d 505, 521 (2000)).
86. *Id.* at 1092.
87. *Id.* at 1093-94.
88. *Id.* at 1094.

medically negligent. In support of these rules, the Supreme Court of Illinois has continually upheld its holding in *Leonardi*, stressing that every defendant has the right to present a defense. The "Notes on Use" for the Illinois Jury Pattern Instructions further bolsters the case law. For instance, *Leonardi* instructs that the long form sole proximate cause instruction, IPI 12.04 "should be given where there is evidence, *albeit slight and unpersuasive,* tending to show that the sole proximate cause of the accident was the conduct of a party other than the defendant."[89] Moreover, as affirmed by the court in *Ready,* a defendant is *entitled* to present evidence regarding conduct of settling defendants, as long as it relates to his sole proximate cause defense.[90]

Following *Ready* and *Robinson*, defendants may be able to contest proximate causation with greater ease. Without the burden of proving a nonparty's negligence, and the availability of pointing to more than one "sole" proximate cause, a defendant is more inclined to successfully argue a sole proximate cause defense. This is particularly disconcerting in the medical malpractice context. As *Robinson* instructs, pointing to a preexisting condition may be sufficient to defeat proximate causation, and hence, liability. According to the First Appellate District, the defendant may "throw out" any other medical condition that may be the cause of plaintiff's injury to be entitled to the instruction:

> Plaintiff argues 'it is not enough to simply throw out a medical condition and allow the jury to determine whether there is a casual relationship between that condition and the claimed injury.' Again, we must disagree with plaintiff.[91]

Although the effect of *Robinson* has yet to be seen, this language may have far-reaching consequences for medical malpractice litigation. Specifically, it poses a unique challenge for plaintiffs, especially those litigating complex medical cases, because defendants may be better equipped to contest liability by pointing to a pre-existing condition of the plaintiff's. Moreover, as a result of *Ready*, plaintiffs may grow reluctant to settle with less than all of the defendants prior to trial. The outcome of *Ready* invites non-settling defendants to argue that the real and sole cause of injury lies in a settling defendant.

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89. Ready, 939 N.E.2d 417, 422 (Ill. 2010) (citing Leonardi, 658 N.E. 2d at 459).

90. *Id.* at 421-422 (emphasis added).

91. Robinson, 930 N.E.2d 1087, 1094 (Ill. App. Ct. 2010).

D. The Sole Proximate Cause Defense Needs Future Refining

The sole proximate cause defense is a viable mechanism for defendants to contest proximate causation in any negligence suit. However, the scope and availability of the defense has grown to sweeping allowances. In contrast with today's standard, Illinois courts should reconsider the higher evidentiary requirement rejected in *Freeman v. Petroff*.[92] In *Freeman*, the court reconsidered its holding in light of *Leonardi*, finding there was sufficient evidence to support the defendant's sole proximate cause defense. The *Freeman* court ultimately rejected plaintiffs' contention that ". . .where the medical malpractice of a nonparty is alleged, the defendant must establish through expert testimony the generally accepted standard of care for the particular situation, a deviation from that standard, and a causal connection between the nonparty's deviation and the plaintiff's injury, in order to give the. . . [long form] IPI 12.04."[93] If *Freeman* was positive law today, any defendant alleging sole proximate cause in another person or entity would be required to support that allegation with expert testimony. This has the effect of equating the defendant's burden of proof to the plaintiff's.[94]

Heightening the required evidentiary threshold for defendants who raise a sole proximate cause defense may be advantageous in two ways. First, it helps to mitigate the prejudicial imbalance caused by the sole proximate cause defense. As the law stands today, the doctrine is rather prejudicial to plaintiffs. Because defendants are not required to plead sole proximate cause as an affirmative defense, defendants may interject a sole cause argument at any time during trial. By doing so, the plaintiff is forced to prove his case in chief, in addition to rebutting the defendant's sole proximate cause defense.[95] The lack of notice given to plaintiffs is akin to undergoing trial by ambush. Reconsidering the proposition in *Freeman* may help to balance the present inequities between plaintiffs and defendants. Moreover, requiring a greater showing from the defendant does not disturb the plaintiff's burden of proof. He or she still bears the same burden; however, the plaintiff is better able to focus on establishing the defendant's liability at trial, as opposed to rebutting the liability of

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92. Freeman v. Petroff, 680 N.E.2d 453 (Ill. App. Ct. 1997).

93. *Id.* at 459.

94. It is important to note, however, that the court has dismissed this proposition once before. As expressed in *Leonardi*, "Obviously, if there is evidence that negates causation, a defendant should show it. However, in granting the defendant the privilege of going forward, also called the burden of production, the law no way shifts to the defendant the burden of proof." 658 N.E. 2d at 454.

95. Phillips, *supra* note 11, at 8.

some other party or entity.

Second, heightening the evidentiary threshold promotes sound judicial policy. Currently, the sole proximate cause defense equates to finger-pointing. Attributing blame to nonparties and resurrecting evidence that points to settling-defendants undermines the purpose of the justice system. Similarly, the sole proximate cause defense encourages defendants to cast blame on others in an attempt to avoid liability. Narrowing the scope of the defense would help to focus the trial on the primary inquiry at hand.

VI. CONCLUSION

Particularly in recent years, the sole proximate cause defense has expanded considerably under Illinois tort law. This concern is further exacerbated by the ease, in which the defense may be raised, and the expanding scope and availability of who the defendant may point to. While defendants should be afforded the right to present the sole proximate cause defense, the process by which the defense is raised should have appropriate limitations and guidelines. It has yet to be seen how *Ready* and *Robinson* will affect the future of sole proximate cause in Illinois. However, it is clear that the defense has grown more defendant-friendly and prejudicial to plaintiffs in recent years. It will be for the courts and legislature to address these growing concerns and doctrinal limitations.